United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,180

967

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR - 3 1958
Joseph W. Stewart
CLERK

CHARLES J. CLARKE, JR.,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORD E. YOUNG, JR.
JOSIAH LYMAN
1125 Warner Building
Washington 4, D. C.
Attorneys for Appellant

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

STATEMENT OF QUESTION PRESENTED

The question is whether the Court below erred in failing to adequately and properly instruct the jury in this cause to the detriment of this defendant in that the Court allowed an alleged statement by the accused to the effect that the "said he knew that he was in trouble" to be introduced in evidence by the witness Madeline Virginia Arnett, under circumstances which put the defendant in a state of fear in that he had been taken to the so-called "security room" of the Sears-Roebuck Company store at 2845 Alabama Avenue and was then and there being questioned by a police officer and various officials and/or employees of said corporation, without privilege of counsel and without having had his Constitutional rights explained to him.

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UNITED STATES COURT OF APPEALS

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No. 14,180

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THE UNITED STATES OF AMERICA,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

It is respectfully submitted that the jurisdiction of this Honorable Court to review the decision of the United States District Court for the District of Columbia is based upon Section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Charles J. Clarke, Jr., when 19 years of age, was charged with the crimes of "Forgery" (Count Number 1, Page 1, Appendix for Appellant) and "Uttering" (Count Number 2, page 2, Appendix for Appellant). The jury returned a verdict of "guilty."

Although several points were argued in the "Motion For a Judgment of Acquittal Notwithstanding Verdict or in the Alternative a Motion For a New Trial," this appeal is based upon the rulings of his Honor at trial in connection with the testimony of the witness, Madeline Virginia Arnett, the Security Officer of the Sears-Roebuck store located at 2845 Alabama Avenue, S. E., this city, said rulings having been made with knowledge of circumstances under which now appellant was alleged to have confessed that he knew that he was in trouble (Page 19, Appendix for Appellant).

SUMMARY OF ARGUMENT

The trial judge in the Court below prejudiced the then accused (now appellant) by allowing the Security Officer to testify that accused confessed that "he knew he was in trouble."

The trial judge erred in allowing the testimony that accused said that he knew he was in trouble and erred in not instructing the jury to disregard same.

ARGUMENT

The evidence, as can be seen from a reading of pages 8 through 18 of the Appendix for Appellant, shows that now appellant, after his arrest, was taken by Police Officer Lynch through the Sears-Roebuck store at 2845 Alabama Avenue, S. E. and into the basement of said store where he had to await the key for the opening of the so-called "security room," whereupon he was taken into said room and questioned by the witnesses, Officer Lynch, a Mr. Homan and the Security Officer for said store, Mrs. Arnett. Later, a Mr. Nelson, another official or employee of said store, came into said room. This presents the amazing picture of an accused being taken by a policeman to confines within the dominion of a private corporation and then confronted with circumstances obviously designed to put him in a state of fear. While in these circumstances, now accused, who was then only 19 years of age, is alleged, in answer to questions of Mrs. Arnett, to have admitted that he ran away because he knew that he was in trouble.

It is respectfully submitted that this testimony most certainly must have prejudiced this accused in the minds of the jurors and that it could not have had any other effect upon the jurors. This situation clearly brings this case within the dicta of this Honorable Court in the case of Watson v. United States, 234 F. 2d 42, as found on page 48:

> "It is not for us to say that he was only slightly prejudiced. It is enough that he could have been prejudiced."

It is also respectfully submitted that the refusal of the right to counsel and the failure to have warned accused of his right to remain silent under these circumstances bring the foregoing confession (even though only partial as to guilt of accused) within the rules of an involuntary confession as laid down in McNabb v. United States, 318 U.S. 343; Wan v. United States, 266 U.S. 1; and Bram v. United States, 168 U.S. 532. Indeed, this accused was forced into a position which resulted, by the admission of aforementioned testimony, in his becoming an involuntary witness against himself.

The motion which is set forth on pages 20 and 21 of the Appendix for Appellant gave to the trial court an opportunity to repair the damage which had been done insofar as above referred to testimony prejudiced now appellant in the minds of the jurors. It was incumbent upon counsel to make such motion. Same was denied. It is respectfully submitted that, in accordance with principles set forth in cases cited hereinabove, said motion should have been granted and that the trial judge should have made a sincere effort to erase from the minds of the jurors all implications which they may have made from aforementioned testimony.

In view of the foregoing, it is respectfully submitted that a new trial should be granted to appellant.

Respectfully submitted,

FORD E. YOUNG, JR.

JOSIAH LYMAN,

1125 Warner Building
Washington 4, D. C.

Attorneys for Appellant.

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APPENDIX FOR APPELLANT

1 [Filed in Open Court March 4, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grand Jury Impanelled December 27, 1956, Sworn in January 2, 1957

The United States of America	:	Criminal No. 228-'57
v.	:	Grand Jury No. 176-57
Charles J. Clarke, Jr.	:	Forgery and Uttering (22 D.C.C. 1401)

The Grand Jury charges:

On or about January 22, 1957, within the District of Columbia, Charles J. Clarke, Jr., with intent to defraud, falsely made and forged in its entirety a paper writing in the form of a retail credit check. Following is a photostatic copy of said falsely made and forged retail credit check:

No. G 391895
REDEEMABLE FOR MERCHANDISE OR CASH IN THIS STORE
NOT NEGOTIABLE — DO NOT BANK
Sears, Roebuck and Co. — Retail Credit Check

STORE STAMP
CUSTOMER'S NAME Norman Bell ACCT. No.
STREET NO. OR RURAL ROUTE 1421-W-ST SE. TELEPHONE NO.
CITY Wash D.C. STATE 33

DIV	DEPT.	CLASS	DATE OF SALE	AUTHORIZED BY
40	36	1	1/22/57	

1	#865 Paint sprayer ½hp motor	49	88
	DC Tax	1	10
$	FIFTY — 89	50	88

PAYMENT RECEIVED Norman Bell

☒ RETURN ☐ ALLOWANCE ☐ SALES CANCELLATION
☐ C.O.D. ACCTS. DISC. ☐ C.O.D. ACCTS. AMT. ☐ DEPOSIT RET'D (ATTACH SHIPPING COPY)
REASON Can not use

S REV 7-19-56

2 SECOND COUNT:

On or about January 22, 1957, within the District of Columbia, Charles J. Clarke, Jr., with intent to defraud, passed and uttered to Margaret B. Woods, as true and genuine, a forged retail credit check, a copy of which is set forth in the first count of this indictment and is incorporated herein by reference, well knowing the aforesaid retail credit check was forged.

/s/ Oliver Gasch
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Daniel L. Harbour
Foreman.

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3 PLEA OF DEFENDANT

[Filed March 8, 1957]

On this 8th day of March, 1957, the defendant Charles J. Clarke, Jr., appearing in proper person and by his attorney, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

By direction of

BOLITHA J. LAWS
Presiding Judge
Criminal Court #4

Present:

United States Attorney

By A. Stevas
Assistant United States Attorney

Harry M. Hull, Clerk

By /s/ Paul Roser
Deputy Clerk

* * *

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4 [Filed March 19, 1957]

MOTION TO SUPPRESS

Comes now the defendant, Charles J. Clarke, Jr., by his counsel of record, and respectfully moves this Honorable Court to suppress as admissible evidence in this cause, the alleged retail credit check and any

statements made, written or orally, to the authorities or obtained by the Police from the defendant on or about January 22, 1957 or after, and for reasons therefor says as follows:

1. That said evidence was obtained contrary to law.

2. That said evidence was obtained from this defendant in violation of his fundamental constitutional rights.

3. That the evidence was obtained from the defendant in contravention of his constitutional rights under the Fourth and Fifth Amendments of the Constitution.

4. And for other reasons to be presented at the hearing of this matter.

/s/ Ford E. Young, Jr.
* * *

/s/ Josiah Lyman
* * *

Attorneys for Defendant

[Certificate of Service]

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5 [Filed March 19, 1957]

MOTION TO DISMISS

Comes now the defendant, Charles J. Clarke, Jr., by his counsel of record, and respectfully moves this Honorable Court to dismiss the indictment against said defendant herein and for reasons therefor says as follows:

1. That the indictment does not set forth an offense against the laws of the United States allegedly committed by the defendant.

2. That the allegations contained in the indictment allegedly charging the defendant with an offense are vague and indefinite and does not set forth with sufficient clarity the charge of offenses, if any, allegedly committed by the defendant.

3. And for other reasons to be presented at the hearing of this matter, the Court should grant unto defendant the relief sought herein.

/s/ Ford E. Young, Jr.
* * *

/Certificate of Service] /s/ Josiah Lyman * * *
Attorneys for Defendant

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6 [Filed April 5, 1957]

On this 5th day of April, 1957, came the attorney of the United States; the defendant by his attorneys: Josiah Lyman and Ford E. Young, Jr., Esquires; whereupon the motion of the defendant to dismiss the indictment, coming on to be heard, is by the Court denied; thereupon the motion of the defendant to suppress evidence, coming on to be heard, is by the Court denied without prejudice.

By direction of

CHARLES F. McLAUGHLIN
Presiding Judge
Criminal Court #2

* * * * * *

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17 [Filed April 18, 1957]

On this 18th day of April 1957, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, returns into Court at 10:00 A.M. and retires to resume their deliberation; whereupon the said jury upon their oath say that the defendant is guilty as indicted; and thereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is allowed to remain on bond.

By direction of

JOHN J. SIRICA
Presiding Judge
Criminal Court # Four

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18 [Filed April 24, 1957]

MOTION FOR A JUDGMENT OF ACQUITTAL NOTWITHSTANDING VERDICT OR IN THE ALTERNATIVE A MOTION FOR A NEW TRIAL

Comes now the defendant, Charles J. Clarke, Jr., by his counsel of record and respectfully moves this Honorable Court to grant unto the

defendant his judgment of acquittal on both counts of the indictment notwithstanding the verdict herein, and/or in the alternative grant unto said defendant a new trial, and for reasons therefor says as follows:

1. That the verdict of the jury was contrary to the evidence adduced at the trial of this case; and that the Government did not establish a prima facie case, in its case in chief, warranting that the case proceed further, on either count of the indictment, to the end that the same should have been submitted to the jury.

2. That the verdict was contrary to law.

3. That the verdict was contrary to the weight of the evidence; and that at the conclusion of all of the evidence adduced at the trial of this case, the Court should have directed a verdict in favor of the defendant and entered a judgment of not guilty on his behalf.

4. That the Government failed to prove all of the elements required by law as to the first count of the indictment against this defendant; and that the Government failed to prove all of the elements required by law as to the second count of the indictment against this defendant.

5. That the Court erred in its instructions to the jury, and as a consequence thereof the fundamental rights of the defendant were prejudiced.

6. That the Court erred in failing to adequately and properly instruct the jury in this cause to the detriment of this defendant.

7. And for other reasons to be presented at the hearing of this matter, the defendant respectfully urges this Court to grant unto him the relief sought herein.

/s/ Ford E. Young, Jr.
* * *

/s/ Josiah Lyman
* * *

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19 [Filed May 3, 1957]

On this 3rd day of May, 1957, came the attorney of the United States; the defendant by his attorney, Josiah Lyman, Esquire; whereupon the motion of the defendant for a judgment of acquittal notwithstanding verdict and/or in the alternative a motion for a new trial, coming on to be heard, after

argument by counsel, is by the Court denied.

By Direction of

JOHN J. SIRICA
Presiding Judge
Criminal Court #4

* * * * * *

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20 [Filed June 28, 1957]

JUDGMENT AND PROBATION

On this 28th day of June, 1957 came the attorney for the government and the defendant appeared in person and by counsel, Ford E. Young and Josiah Lyman, Attorneys-at-law.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Forgery and Uttering as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years on each of Counts One and Two; said sentence by the counts of the indictment to run concurrently.

It Is Adjudged that the execution of the said sentence be, and the same is hereby suspended, and that the defendant be, and he is hereby placed on probation for a period of Two (2) years, in charge of the Probation Officer of the Court.

/s/ John J. Sirica
United States District Judge.

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21 [Filed July 6, 1957]

NOTICE OF APPEAL

Name and address of appellant Charles J. Clarke, Jr.

Address - 4479 Fort Drive, S. E., Washington, 23, D. C.

(Suitland, Maryland)

Name and address of appellant's attorney Ford E. Young, Jr. and Josiah Lyman, 501 - 13th Street, N. W., Washington, D. C.

Offense Forgery and Uttering.

Concise statement of judgment or order, giving date, and any sentence. Upon the jury's verdict of guilty on both counts of the indictment, the Court ordered and sentenced the defendant, on June 28, 1957, to imprisonment on each of the two counts of the indictment for a term of one (1) to three (3) years, the sentences on each count to run concurrently; that the court suspended the imposition of sentence on each count of the indictment, and placed the defendant on probation for a period of two (2) years.

Name of institution where now confined, if not on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

July 6, 1957.
Date

/s/ Charles J. Clarke, Jr.
Appellant

/s/ Ford E. Young, Jr. (J. L.)
/s/ Josiah Lyman
Attorneys for Appellant.

EXCERPTS FROM PROCEEDINGS

[The following excerpts from the trial proceedings are taken directly from the shorthand notes of the official reporter and as of the date of the filing of this appendix do not appear transcribed in any other form.]

* * * * * *

[The following colloquy took place after testimony of arresting officer Lynch and eye-witness Homan heard by the Court out of the presence of the jury] :

MR. LYMAN: Now, the original motion to suppress any statement that would tend to be a confession or admission against the interests of this defendant, Your Honor -- oral confession ---

THE COURT: What was the alleged statement that the defendant made?

MR. LYMAN: Mr. Homan was about to testify to a statement that he made which purported to be an incriminating statement.

THE COURT: What did he say about it?

MR. LYMAN: Before it was made Your Honor allowed this inquiry -- the statement that he received this credit slip from an old man outside and did various things with it. I want all that stricken and suppressed, and respectfully request Your Honor not to permit the jury to hear any such statement, any such oral confession, or anything made against his interests in that vein to be told the jury by Mr. Homan, by Miss Arnett, by Officer Lynch or anyone else, on the ground that such a statement violated the fundamental constitutional rights of this defendant, that it was elicited from him in violation of his rights. He was not advised of his constitutional rights in the matter, he was not advised while he was under arrest that he didn't have to make a statement or that if he did make a statement it would be used against him, or for him, or that it would be used in a proceeding against him; he was never told that. And further, that the statement was unlawfully extracted from him because he was in fear, he was in custody.

THE COURT: Didn't the officer say he appeared to be sulky? Does that indicate fear?

MR. LYMAN: They said he was nervous also; I interpret nervousness to be a form of fear.

THE COURT: I would think he would be nervous. Does that mean, do you contend that under these circumstances, having the information of the actions of the defendant himself, all of this information -- having been arrested or apprehended within minutes after this, a legitimate transaction -- the officer did anything unreasonable in this case? What did he do that was unreasonable?

MR. LYMAN: I contend that the statements to be offered by Mr. Homan and Miss Arnett and the officer, purporting to be a statement made by this defendant, incriminating himself, that that should be excluded. You should never permit the jury to hear that, because it was unlawfully extracted from him.

THE COURT: In what way, Mr. Lyman?

MR. LYMAN: I think he had a right to know in advance, to be told that anything "you say will be used against you." He had a right to be informed that he didn't have to make a statement, since he was under arrest. After all, this wasn't information they were seeking for some civil matter, they were looking for information to use against him, as I view it. The whole picture shows that there was coercion.

THE COURT: In what way?

MR. LYMAN: I will tell you. He was placed under arrest. He was taken back on a crowded street. He was taken through the store. It had some crowd in it. Taken to the security room. Four people gathered around a young man who is nineteen years of age.

THE COURT: What did the defendant say in the security room? What did he say about this transaction? Did he confess?

MR. LYMAN: Here is what he said, according to the testimony of Mr. Homan, that some old man gave him this ---

THE COURT: Some old man with crutches, I think he said, would

give him five dollars.

MR. LYMAN: Gave him this retail credit slip, that is correct, and that he went up there and gave it, and that ---

THE COURT: He said on the way up he thought there was something funny about it.

MR. LYMAN: No, on the way down. He said there was some delay. He thought there was something funny about it, and he left.

THE COURT: Do you call that an admission of guilt? Did he say he did anything wrong? What has he said that implicated him in this crime up to this point? He said that he got this slip from an old man. It is a question for the jury to believe or disbelieve — right?

MR. LYMAN: I don't think the jury should ever hear it.

THE COURT: You and I differ on that. I am going to rule that the jury should hear it. I have made up my mind on this case. You can talk if you want. I am going to make my ruling.

MR. LYMAN: There is no point of talking further if Your Honor has made up his mind.

THE COURT: I don't want to cut you off. You make your motion; I will hear you.

MR. LYMAN: That the jury should not hear anything regarding getting anything from the old man, regarding taking it upstairs. The jury shouldn't hear anything regarding "he thought something was wrong." Those are incriminating statements in this case which would tend to support the Government's case. The jury should not hear anything about his flight. Whether they are true or not I respectfully submit is irrelevant here. Even if it is true, it is not admissible, because it was not legally obtained from him. That is the point.

THE COURT: You mean flight is not admissible as showing consciousness of guilt? What was his reason for running, if he had nothing to conceal? Do you mean the jury can't hear that?

MR. LYMAN: The jury shouldn't hear that.

THE COURT: You tell me why.

MR. LYMAN: Because it is not material to this case. This is a

forgery case.

THE COURT: What difference does it make whether it is a forgery or murder case? You can always show flight as showing a consciousness of guilt. That is the theory that the government offers it under.

MR. HANNAN: Yes, Your Honor; it is so well established.

THE COURT: I am not going to debate the point, Mr. Lyman. I have given you now since some time after ten o'clock. You have gone into this. The matter was before another judge. He said this motion to suppress was overruled without prejudice. The government feels like the Court does, that it wanted to give you all the latitude possible, all the leeway, all the rights you have, to show that this search was illegal, or that this evidence should be suppressed. Up to now, I will be frank to say, you haven't convinced the Court that I should omit the evidence.

MR. LYMAN: I don't know what else I can tell the Court. I can cite you some cases -- the Watkins case -- the most recent case -- regarding the voluntariness of confessions.

THE COURT: This is not a case where this young man had been held for any appreciable length of time, which would bring it within the McNabb case and some of these other cases. This whole thing transpired within anywhere from probably a half hour, I would say -- approximately a half hour -- from the time this young man started to run away from the store and he was apprehended until they talked to him.

I am going to rule that there was probable cause for the arrest, and any statements that he made must go to the jury. I have made my ruling.

* * * * * *

[In the Presence of the jury]

JOHN W. LYNCH

DIRECT EXAMINATION

BY MR. HANNAN:

Q. Officer Lynch, tell us your name, position and assignment.

A. Private John W. Lynch, No. 11 precinct.

* * * * * *

Q. Is that the retail credit check that Mrs. Arnett gave to you in the security office at that time? A. Yes, sir.

Q. Did you and Mrs. Arnett question the defendant at that time? A. Yes, sir.

Q. Will you tell us what the defendant had to say? A. He said some man had given it to him out in front of the store, and he said the man said he had a bad leg, and would he take it upstairs and sign it for him.

MR. LYMAN: I object to this.

THE COURT: Objection overruled.

BY MR. HANNAN:

Q. Continue. A. He said a man had given it to him to sign his name and cash it and he would give him five dollars for taking it up there.

Q. Did the defendant say anything to you with regard to the credit slip at any time? A. Yes, sir, he said he figured it was wrong, something was wrong when he went up there, but he said he needed the five dollars.

* * * * * *

CROSS EXAMINATION

BY MR. LYMAN:

Q. Where did you then go, Officer? A. Down in the security room, Sears & Roebuck.

* * * * * *

Q. Did there come a time when someone started asking questions? A. Yes, sir.

Q. Before that time how many people came into this room as large as the jury box? A. No one. It was locked when we got there. We had to wait for Mrs. Arnett to come downstairs to open it up.

Q. Who went in then? A. Myself and Mrs. Arnett and Mr. Homan.

Q. And the defendant? A. Yes, sir.

Q. That is four people. Was there a fifth person who came in? A. Yes, sir, I think Mr. Nelson -- a Mr. Nelson -- who was part of the security -- Sears & Roebuck.

* * * * * *

Q. Who questioned him first, sir? A. Mrs. Arnett did -- talked to him -- but I was standing right there -- his name and address, and I was getting Mr. Homan's name and address -- just name and address.

Q. I am talking about questioning of him later after you got the names and addresses, when you and Mrs. Arnett were there.
A. There wasn't much questioning afterwards.

Q. There did come a time when you asked him some questions? A. Yes, sir.

Q. Relating the story you told the Court and jury what he said? A. Yes, sir.

THE COURT: Mr. Lyman, will you approach the bench.

(At the bench:)

THE COURT: I have already ruled, out of the presence of the jury, that the arrest was lawful, and that the statements, for what they are worth, incidental to the arrest, are admissible in evidence. Out of the presence of the jury I permitted you to offer evidence of an impeaching nature -- correct?

MR. LYMAN: Correct.

THE COURT: The ruling of the Court is the same now. I have already ruled as a matter of law, the arrest being lawful because the officer had probable cause, whatever was said in the security room is admissible, whether it was an admission or confession or whatever you might call it. I see no purpose now of you attempting -- which I assume you are getting ready to do -- to try to impeach this officer, because I have already ruled on that as a matter of law, that it was a lawful arrest.

MR. HANNAN: Your Honor includes "no illegal detention."

THE COURT: Yes, I understand.

Now, to get this matter before the jury I believe is going to be confusing. You have your record protected. It is going to put them in a position of, maybe, having to pass on this when they don't have any right to pass on it. At the proper time, if you can show by this officer -- lay the foundation to show that any threats were made, that anything the defendant said was involuntarily said, sort of fraud, duress, coercion, inducement -- I will permit you to show that, because if there does become such a question, if that question does come in the case, I will have to properly instruct the jury.

I don't think I can permit you to go into the reasonableness or the lawfulness of the arrest at this point. I have heard the impeaching testimony; I have heard the officer's statement and reply to your question out of the presence of the jury. The jury has nothing to do with this arrest, as I see the picture at this point.

Is that clear? I don't want to go into collateral matters again.

MR. LYMAN: It isn't clear. I am not questioning the arrest at this point. I am questioning the admissibility of the alleged confession.

THE COURT: What do you say is the confession? What do you contend is a confession?

MR. LYMAN: This is a confession: That an older man gave him the ticket and "told me he would give me five dollars if I would go up and cash it." It shows motive. Pursuant to that he went upstairs and attempted to present it.

The defendant hasn't said that. Other people say he said that. It is a confession. It is against his interest. They are saying things that came out of his mouth. He hasn't said that.

THE COURT: I will permit you all the time you want for this, and then I will let the government speak.

MR. LYMAN: Mr. Homan also said the defendant said to him he thought something was wrong; that is why he took off or ran. All of that, as I see it, is an oral confession against his interest. These are

things that did not come out of the defendant's mouth. The defendant has never said them. They say he said them.

Again, I am not questioning the arrest at this point. I am not disputing that point. I am disputing the illegality of letting that, what I call, confession, or oral statements, come before the jury. I feel that I have a right to show the jury that it wasn't voluntary. That is why I tried to show his nervous condition; also, that the officer has previously said he advised him of his rights. I believe I have a right to impeach the credibility of this officer on cross examination.

It is true Your Honor has ruled that the jury can hear it, but why should the jury hear the same things Your Honor heard to let them ultimately pass on whether it was voluntary.

THE COURT: Now let me talk. I have permitted you wide latitude out of the presence of the jury. You didn't have to put the defendant on the stand; that is his constitutional privilege. I permitted you to do that which you had a right to do -- to call these witnesses. You have made no showing yet to me, frankly, by any witness out of the presence of the jury, that this statement he made was gotten from him by any illegal means, that it was involuntarily made. There is nothing in the record on that. As the record stands, it is entirely silent as to that. I gave you an opportunity to do it, if you wanted to.

Now you are trying to bring in -- do indirectly through this officer what you didn't do directly when you had the opportunity to do it, and that is to show out of the presence of the jury that illegal means were used to get this man to make a statement, pressure was used, or inducement. There is nothing like that in the record. All you have is negative answers, denials. That is the posture of the case as I see it.

Now, to permit you to go into this matter, a collateral matter, in the presence of the jury -- I don't think I should do it.

MR. LYMAN: May I say this. I will try to enlighten the Court on our position. I feel that I did get certain admissions which the jury should hear. Even though Your Honor ruled that the so-called confession is legally admissible, I think Your Honor could have ruled that it

was not for these reasons that he wasn't advised of his constitutional rights, that he had a right to be so advised. Failing to advise him is the lawful reason for not permitting it. It is for the jury to pass on whether or not it is a voluntary confession.

THE COURT: You haven't raised that yet. You haven't offered any evidence yet that the confession, if it was a confession, was involuntarily made.

Let me hear the government.

MR. HANNAN: The law, as I understand it -- we have had the McNabb hearing, or the so-called hearing under the McNabb rule. One of three things can result from that hearing. Based on the evidence the Court hears, the Court can rule, number one, that any admissions made by the defendant, or confession made by him, is clearly inadmissible because it clearly was received as a result of duress, inducement. Or in the alternative the Court may rule that since there is no evidence of coercion or duress or any of these other elements that the admissions are clearly admissible, and then it is no longer a question for the jury.

However, if the Court is of the view that duress, coercion, fraud, inducement of some type might have been exercised, then the Court is permitted to leave the question to the jury and the jury can decide whether the confession or admission was received as a result of that.

I understand Your Honor has already ruled that the admission, for what it is worth, if it is an admission against interest, is admissible. So he should be precluded from inquiring into it before the jury.

THE COURT: That is exactly why I called him to the bench.

MR. HANNAN: This is going to go on until after Easter.

THE COURT: It is not going to go on; it is going to stop here. Mr. Lyman, I don't think you can ever say I didn't give you ever opportunity in the world. I permitted you probably too much latitude, but I wanted to see that the rights of the defendant were protected properly. You are going to go into the situation of whether or not you can impeach this man by a prior statement he made in a police court,

which I say has no bearing on this particular issue. The point is that I have heard all of that testimony out of the presence of the jury. I have ruled on it. You never showed me by the defendant in this case, out of the presence of the jury, that he was abused or anything else to the contrary. I can't permit you to go into this collateral matter.

MR. LYMAN: If you don't permit me, that is the end of it, but I wanted to say this: My view, and I think the law supports me -- you can consider that I am asking you to blaze a trail. I take the position that the McNabb case and these others hold that where it is the duty of an arresting officer in a situation such as this, it may not be in every case, or it may be in every case, but each case turns on its own facts and circumstances; but in a case such as this, where there is a nineteen-year-old boy apprehended, arrested, taken down with four or five people around him, I say as a matter of law it was the duty of the police officer to say to him, number one, you don't have to make a statement; number two, I want to advise you that any statement you make will be used against you; number three, you have certain con - stitutional rights.

That is the view I take.

THE COURT: First of all, I called you to the bench to tell you what I was going to do; I didn't want to tell you in the presence of the jury. I did not want to do anything that might prejudice you. I have already ruled. Now let's get on with the trial.

MR. LYMAN: I just want to proffer this evidence.

THE COURT: All right.

MR. LYMAN: I want to proffer this: I want to show to the jury by questioning this officer, number one, that he didn't advise the defendant of his rights when he should have.

MR. HANNAN: I will object to it.

THE COURT: Objection sustained.

MR. LYMAN: Number two, that in a situation like this, where this defendant was held by five people in a little room before he made a statement, the officer or someone should have said to him, "You do

not have to make a statement, and if you do, it will be used against you.

MR. HANNAN: There is no law as authority for that position, Your Honor. I object to that.

THE COURT: Objection sustained.

MR. LYMAN: And, number three, I want to show that on a previous occasion this police officer said that he advised the defendant of his constitutional rights, and at a preliminary hearing on January 30, 1957, before Judge Howard, and at the hearing before Your Honor out of the presence of the jury, he made the statement he did not so advise him.

MR. HANNAN: It is immaterial.

MR. LYMAN: I say it is a material conflict and goes to the credibility of his testimony as a witness. The jury has a right to pass on it.

THE COURT: Objection sustained. I have already ruled, now. You have made your proffer. Let's don't go into that again.

* * * * *

MADELINE VIRGINIA ARNETT

DIRECT EXAMINATION

* * * * *

BY MR. HANNAN:

Q. Mrs. Arnett, are you employed in the District of Columbia? A. Yes, Sears & Roebuck Company, 2845 Alabama Avenue, S.E., as store detective.

Q. Are you also known as assistant security officer? A. That is right.

* * * * *

Q. Mrs. Arnett, at that time did you have occasion to talk to the defendant? A. Yes, I did, for a few minutes.

Q. Did you talk to him about what, particularly? A. Well, I asked him why he ran.

MR. LYMAN: I didn't hear.

THE WITNESS: I asked him why he ran.

MR. LYMAN: With respect to this line of questioning, the same objection as to the testimony of Mr. Homan and Officer Lynch. I want to interpose the same objections, for the same reasons that were announced at the bench.

THE COURT: Very well.

MR. HANNAN: May she answer?

THE COURT: You may answer. You said you asked him why he ran.

THE WITNESS: That's right.

BY MR. HANNAN:

Q. What did he say? A. He said he knew he was in trouble.

* * * * *

CROSS EXAMINATION

BY MR. LYMAN

* * * * *

Q. You testified that you questioned, or you spoke to the defendant, is that right? A. That's right.

Q. Did you make any notes? A. No.

* * * * *

Q. Did you ask him his name? A. No, that had already been taken care of. I didn't arrest him or anything. I had no reason to ask him or take any notes on anything.

* * * * *

Q. Did Officer Lynch question him in your hearing? A. No. The defendant asked to call a lawyer and he did tell him he could at the precinct.

Q. I didn't hear you. A. He asked could he call his lawyer, and he told him he could at the precinct. That is all that I heard between those two.

Q. Officer Lynch said he couldn't call his lawyer at the security office? A. No ---

* * * * *

Q. Before any conversation took -- strike that. Who spoke to whom first? A. Well, I don't know, because he was in there when I came down to the security office, as I told you before. Everyone was in there when I arrived.

Q. You spoke to him? A. That's right.

Q. Did Officer Lynch speak to him after you concluded your conversation with him? A. I don't remember.

Q. You testified that Officer Lynch made a statement in your presence that he could call his lawyer at the precinct, is that right? A. Yes, that's right.

Q. Was any reason given why he couldn't call his lawyer right there at the security office? A. No, there was nothing else said.

* * * * * *

Q. According to my notes,on direct examination the only things you related, you said that the defendant said he ran because he was in trouble, is that right? A. That's right.

Q. What else did he say? Is that all he said? A. I don't remember anything else he said.

Q. But you do remember some talk about a lawyer. A. Not some talk.

THE COURT: She has already testified about the lawyer.

BY MR. LYMAN:

Q. When was that? Was that before he said this business about trouble? A. That was after.

Q. And that's the entire conversation that took place that you heard? A. Yes.

Q. Is that right? A. He asked me for a cigarette and I gave him one.

Q. * * * Was there any other conversation that you heard? A. Not that I recall.

* * * * * *

MR. YOUNG: * * * I would like to make a motion * * * to

strike all evidence with regard to conversations which took place in the security room of Sears & Roebuck. Here we have a nineteen-year-old boy who was paraded through the store by a posse, taken into a room in the basement, by a private corporation and its officials, accompanied by a police officer.

I respectfully submit to Your Honor that the circumstances, coupled with his request for counsel, which was denied, shows that he was in such fear that all evidence as to any statement made by him should be disregarded by this jury.

THE COURT: Motion denied.

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CERTIFICATE

Certified to be the official transcript of excerpts of trial proceedings in U.S. v. Clarke, Cr. No. 228-57, April 15, 16, and 17, 1958.

Robert J. Thiel
Official Reporter